Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. __-____

IN THE

Supreme Court of the United States

October Term, 1988

CLALLAM COUNTY, *et al.*,

Petitioners/Plaintiffs,

v.

DEPARTMENT OF TRANSPORTATION
OF THE STATE OF WASHINGTON

Respondents/Defendants.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Plaintiff,

v.

FEDERAL HIGHWAY ADMINISTRATION, *et al.*,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 31, 1988

QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit erred in concluding that insurance proceeds obtained by the State of Washington as a result of damage to the Hood Canal Bridge and transferred to the federal government as a condition to receipt of federal emergency relief funds were "costs of construction" under 23 U.S.C § 129(a) which the State could recover from subsequent bridge tolls?

PARTIES TO THE PROCEEDING

Plaintiffs/Petitioners are:

(1) Clallam County;
(2) The City of Port Angeles;
(3) The Fair Toll Coalition;
(4) David Douglas; and
(5) The Port of Port Angeles

Defendants/Respondents are:

(1) The Department of Transportation of the State of Washington;
(2) The State of Washington;
(3) Duane Berenson, Secretary of the Department of Transportation, State of Washington; and
(4) The Federal Highway Administration, United States Department of Transportation.

The additional parties were joined by consolidation and were not party to this appeal.

Third Party Plaintiff is:

(1) The Washington State Department of Transportation

Third Party Defendants are:

(1) The Federal Highway Administration; and
(2) Ray Barnhart, Administrator, Federal Highway Administration.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to Proceeding ii

Opinions Below 1

Jurisdiction of This Court 2

Relevant Statutory Provisions 2

Federal Jurisdiction 2

Statement of The Case 2

Reasons For Granting The Writ 6

A. The Congressional Intent Expressly Set Forth in 23 U.S.C. § 301 and the Legislative History of the Act Mandate Reversal of the Ninth Circuit's Opinion. 6

B. The Ninth Circuit Erroneously Granted Undue Deference to Agency Interpretation of 23 U.S.C. §§ 301 and 129(a). 10

C. Because 23 U.S.C. § 129(a) Is An Exception to 23 U.S.C. § 301, It Is to Be Strictly Construed. 12

D. The Appellate Court's Opinion Sanctions Absurd and Freakish Results. 14

Conclusion 15

TABLE OF CONTENTS. *(Continued)*

Page

Appendices:

Appendix A - Opinion of U.S. Court of Appeals For The Ninth Circuit 1a

Appendix B - U.S. District Court — Findings of Fact. Conclusions of Law And Order 31a

Appendix C - U.S. District Court — Findings of Fact. Conclusions of Law and Order Granting Permanent Injunction 47a

Appendix D - U.S. Court of Appeals For The Ninth Circuit — Order 52a

Appendix E - 23 U.S.C. § 101(a) 54a
23 U.S.C. § 120(f) 54a
23 U.S.C. § 129(a) 55a
23 U.S.C. § 301 . . . . . 57a
23 CFR § 668.105(d) 57a
23 CFR § 668.107(b) 57a

Appendix F - 129(a) Agreement Between Washington State Department of Transportation and Federal Highway Administration 58a

TABLE OF AUTHORITIES

Page

Cases

Griffin v. Oceanic Contractors, Inc., 458 U.S. 565, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982) 14

Morton v. Ruiz, 415 U.S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974) 11

Schlemmer v. Buffalo R & P Railway, 205 U.S. 1, 27 S. Ct. 407, 51 L. Ed. 68 (1907) 12

Securities Industry Association v. Board of Governors, 468 U.S. 137, 104 S. Ct. 2979, 82 L. Ed. 2d 107 (1984) 10-11

Statutes

Title 23 U.S.C. 13

23 U.S.C. § 101(a) 2,13

23 U.S.C. § 120(f) 2,7,14

23 U.S.C. § 125 2

23 U.S.C. § 129 6,7

23 U.S.C. § 129(a) . . . . . 2,3,4,7 *passim*

23 U.S.C. § 301 . . . . . 2,4,6,8 *passim*

23 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

28 U.S.C. § 1346(1) 2

TABLE OF AUTHORITIES, (Continued)

Page

Regulations

23 CFR § 668.105(d) 2

23 CFR § 668.107(b) 2,13

United States Supreme Court Rules

Rule 17.1(c) 6

Other Authorities

Florida Sunshine Skyway Bridge, 129(a) Agreement 11

H.R. No. 7617, 64th Cong., 1st Sess. (July 11, 1916) 8

H.R. No. 2109, 69th Cong., 2nd Sess. (February 16, 1927) 9

H.R. No. 16551, 69th Cong., 2nd Sess. (March 3, 1927) 8

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WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Plaintiff,

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Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit (App. A, *infra*, pp. 1a-30a) is reported at 849 F.2d 424 (9th Cir., 1988). The Findings of Fact and Conclusions of Law and Order of United States District Judge Jack E. Tanner dated August 15, 1985, (App. B, *infra*, pp. 31a-46a) is unreported.

The Findings of Fact, Conclusions of Law and Order Granting Permanent Injunction of Judge Tanner dated August 29, 1985, (App. C, *infra*, pp. 47a-51a) is unreported.

JURISDICTION OF THIS COURT

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered and filed on June 14, 1988. Subsequently, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which was denied by the Court of Appeals by an Order entered on August 2, 1988. (App. D, *infra*, pp. 52a-53a.) The jurisdiction of this Court is invoked under 23 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent provisions of the statutes and regulations herein involved are 23 U.S.C. §§ 101(a); 120(f); 129(a); 301 and 23 CFR §§ 668.105(d) and 668.107(b) and are set forth in Appendix E, *infra*, p. 54a-57a.

FEDERAL JURISDICTION

Original federal jurisdiction in this case rests on federal question jurisdiction under 28 U.S.C. §§ 1331, 1346(1) and 1343.

STATEMENT OF THE CASE

In February 1979, the west half of the Hood Canal Bridge was destroyed by a storm. The State of Washington applied to the Federal Highway Administration (FHWA) for emergency relief funds available under 23 U.S.C. § 125 for one hundred percent (100%) of the cost of reconstructing the bridge. In March 1979, the FHWA committed to pay one hundred percent (100%) of the costs of rebuilding the bridge, less property damage insurance proceeds received by the State which had to be paid to the FHWA pursuant to 23 CFR § 668.105(d). The ultimate unaudited costs of reconstruction were approximately $146 million.

Property damage insurance was carried on the bridge from the time of its original construction in 1961. The insurance premiums were paid for out of the tolls collected by the State from those individuals crossing the bridge. The insurance premiums averaged $80,000 per year, with total premiums of approximately $1.4 million paid out as of the date of the bridge collapse. The Washington State Department of Transportation (WSDOT) subsequently collected $30.5 million in property damage insurance for the bridge on October 5, 1979.

On May 20, 1980, the FHWA and the WSDOT entered into an agreement, hereinafter referred to as the "129(a) agreement" (App. F, *infra*, pp. 58a-66a.) The purpose of that agreement was to delineate the terms and conditions under which Washington State could continue to collect tolls on the new Hood Canal Bridge. This agreement was necessary because 23 U.S.C § 301 requires that all bridges constructed or reconstructed with funds contributed by the federal government must be toll free subject only to those narrow exceptions set forth in 23 U.S.C. § 129(a). Section 129(a) permits the State to collect tolls only to the extent that, after deduction for maintenance and operation, those tolls are applied to repay "costs of construction" incurred by the State.

The 129(a) agreement allowed the WSDOT to collect tolls to repay the following sums, as if they were "costs of construction":

Unrecovered Construction Costs from Original Bridge	Approx. $ 8,000,000
Property Damage Insurance Proceeds	Approx. $ 30,500,000
Interest on Insurance Proceeds	(Unknown at that Time) $ 11,000,000

The Petitioners originally filed suit in the Superior Court of the State of Washington in June of 1983. The FHWA was not a party to this original suit. On November 5, 1984, the

trial court entered a stay of further State court proceedings to allow the parties to refile in Federal District Court.

The present action was filed in the United States District Court for the Western District of Washington at Tacoma on November 21, 1984. On December 28, 1984, WSDOT filed a separate action against FHWA to resolve the then existing dispute on the amount of interest earned on the insurance proceeds and how much, if any, could be recovered from future tolls on the bridge. This latter action was consolidated with the Petitioners' action.

On May 16, 1985, Petitioners filed two motions for partial summary judgment against FHWA and the State. The first contended that the bridge tolls constituted an illegal and unconstitutional tax. Petitioners argued that the tolls were set at levels in excess of maintenance, operations and debt service costs in order that net revenues were available to subsidize the State ferry system.[1] In the second motion, Petitioners contended that the 129(a) agreement between the State and the FHWA violated 23 U.S.C. §§ 301 and 129(a).

The State and FHWA responded by filing cross-actions for summary judgment on the issue of the validity of the 129(a) agreement.

On August 1, 1985, the District Court orally denied the cross-motions for partial summary judgment and granted the Petitioners' motion. On August 15, 1985, the Court entered written Findings of Fact and Conclusions of Law and an Order granting Partial Summary Judgment to the Petitioners, stating:

> 7. The insurance proceeds and interest thereon are not the State's costs of construction to be repaid to the State from tolls on the Hood Canal Bridge pursuant to Title 23 U.S.C § 129(a).

[1] In October of 1982 the auto-toll for crossing the Hood Canal Bridge was set at $2.50.

> 8. The inclusion of the insurance proceeds and interest thereon in the May 20, 1980 agreement . . . is in violation of Title 23 U.S.C. § 301 and Title 23 U.S.C. § 129(a).

(App. B., pp. 44a-45a.)

On August 29, 1985, the District Court entered additional Findings of Fact, Conclusions of Law and Order Granting Permanent Injunction against the State from further collection of tolls on the Hood Canal Bridge. (App. C., pp. 47a-51a.) The District Court concluded that:

> 23 U.S.C. § 129(a) (2) required that no tolls be charged on the Hood Canal Bridge after the State has been repaid its costs of construction. Since the State has been so repaid, federal law requires the bridge to be toll-free.

(App. C, pp. 49a-50a.)

The State timely appealed to the Court of Appeals for the Ninth Circuit. On June 14, 1988, the Court of Appeals reversed and remanded the case pursuant to the written Opinion of Judge Betty B. Fletcher. (App. A, *infra*, pp. 1a-30a.) The Opinion was premised on the Court's conclusion that "the State expended the insurance proceeds and interest as 'costs of construction' for purposes of section 129(a)." (App. A, *infra*, p. 30a.)

Petitioners subsequently filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. On August 2, 1988, the Ninth Circuit denied Petitioners' Petition for Rehearing. (App. D, *infra*, pp. 52a-53.)

REASONS FOR GRANTING THE WRIT

This Court should issue a Writ of Certiorari based upon the grounds specified in Rule 17.1(c), among others. The decision of the Court of Appeals for the Ninth Circuit is based upon an important question of federal law which has not been settled by this Court nor, in fact, been addressed in any reported case from any jurisdiction. Likewise, the Court of Appeals' decision erroneously fails to apply basic rules of statutory construction long recognized by this Court.

The Ninth Circuit's Opinion is contrary to the legislative history and expressed Congressional intent that highways and bridges constructed with federal monies be toll-free. The Ninth Circuit gave undue deference to agency interpretations which were ever-changing, internally inconsistent, and in conflict with Congressional policy. Furthermore, the Court of Appeals failed to narrowly construe the § 129 exception to the general policy of toll-free bridges. Finally, the Ninth Circuit's interpretation of 23 U.S.C. § 129 sanctions absurd and freakish results.

A. The Congressional Intent Expressly Set Forth in 23 U.S.C. § 301 and the Legislative History of the Act Mandate Reversal of the Ninth Circuit's Opinion.

The Court of Appeals disregarded the express and unambiguous Congressional intent that bridges built with federal monies must be toll-free. 23 U.S.C. § 301 states in full:

> Except as provided in § 129 of this Title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this Title shall be free from tolls of any kinds.

(App. E, *infra*, p. 57a.)

This federal policy makes sense. If the people, as taxpayers, have paid for the highway or bridge through their taxes, they should not have to pay for the facility a second time through tolls.

Although the Ninth Circuit articulated this basic policy in its Opinion (App. A, *infra*, p. 23a), it quickly ignored the statute's mandate and engaged in an extraordinary interpretation of the exceptions set forth in 23 U.S.C. § 129. The pertinent paragraphs of 23 U.S.C. § 129(a) are:

> (1) *All tolls* received from the operation of the bridge or tunnel, less the actual cost of such operation and maintenance, *shall be applied to the repayment* to the State or public authority of all the *costs of construction* or acquisition of such bridge or tunnel, except that part which was contributed by the United States;
>
> (2) *No tolls shall be charged* for the use of such bridge or tunnel *after the State* or other public authority shall have been so *repaid* . . . (Emphasis added.)

(App. E, *infra*, p. 56a.)

The nature and extent of this exception is the fundamental issue of this Petition.

The exception in § 129(a) is both logical and consistent with other statutes governing the Emergency Relief (ER) program. The ER program is a special program to provide federal assistance to States to repair roads and bridges that have been damaged through natural disasters or catastrophic failure. In 23 U.S.C. § 120(f), the FHWA is permitted, but is not required, to grant 100% federal funding of the ER projects. (App. E, *infra*, pp. 54a–55a.) Under the statutory regime, if there is not 100% federal funding, the State would have to pay some of the cost of reconstruction as State matching funds. It is, therefore, logical for 23 U.S.C. § 129(a) to allow tolls to be collected and "applied to the repayment to the State [of] . . .

the costs of construction." The federal government should not remove from the State a logical source of revenue to repay the State if 100% federal funding is not available.

On September 8, 1976, the FHWA established a policy that all ER projects would be financed with 100% federal funds. The FHWA committed to 100% funding of the Hood Canal Bridge project. No State matching funds were required of the WSDOT for the Hood Canal Bridge project.

The exception in 23 U.S.C. § 129(a) also makes sense because a State may have unrecovered costs from the original construction. In this case, the WSDOT had approximately $8 million in unrecovered costs from the original construction of the Hood Canal Bridge. The Petitioners have not challenged the WSDOT's collection of tolls to pay for the original unrecovered construction costs.

The legislative history of 23 U.S.C. §§ 301 and 129(a) demonstrate a Congressional intent to prohibit states from making profits from toll facilities. As early as 1916, Congress unequivocally mandated in the predecessor to 23 U.S.C. § 301 the rule that roads and bridges constructed with the aid of federal monies "shall be free from tolls of all kinds." H.R. No. 7617, 64th Cong., 1st Sess. (July 11, 1916). This policy was only slightly modified by passage of the so-called Oldfield Act in 1927. H.R. No. 16551, 69th Cong., 2nd Sess. (March 3, 1927). The Oldfield Act is the direct predecessor to what has now been recodified as 23 U.S.C. § 129(a). The House Report accompanying the Oldfield Act reveals that Congress became concerned that since the states were expending all of their available funds for the improvement of roads, they did not have sufficient funds to construct bridges over rivers and navigable waters without charging tolls for the use of them. Concerned that the states would leave the construction and operation of bridges to the avarice of private parties, the Committee stated:

> Of course, private capital will not invest in such structures without a reasonable opportunity for *profit*, and it is believed that it will be a proper and wise policy to permit the states themselves or their counties or other political subdivisions, if they choose to do so, to use federal-aid funds allotted to them for the construction of toll bridges within their borders, *provided all tolls collected are applied to the maintenance and operation of the bridge and thereafter to the repayment of the amounts invested in them by the States* or counties, and *provided further that after the amounts invested in such bridges by the States or counties have been repaid that the bridges shall thereafter be free of tolls.* (Emphasis added)

H.R. No. 2109, 69th Cong., 2nd Sess. (February 16, 1927).

Rather than permit private parties to make a profit on the use of toll bridges, Congress chose to permit the States to build bridges with the participation of federal funds and charge tolls to repay themselves for "the amounts invested in such bridges by the States." However, to eliminate the ability to make a profit, Congress expressly provided that after the amounts "invested" in the bridges by the States have been "repaid," the bridge must be operated toll-free.

If a State wants to build a bridge on its own, charge tolls on it and make a profit, it is unhampered by federal law. But once it uses federal money to build or rebuild that bridge, then federal law requires that it be toll-free. The exception (23 U.S.C. § 129(a)) to this requirement allows "repayment" to the State through tolls for its costs of construction. The use of insurance proceeds is not a cost to the State to be repaid. There is no investment by the State to be repaid. The WSDOT has a rebuilt bridge, and therefore, *has been made whole.* If it also gets $41.5 million for insurance proceeds (and interest), then it has made a $41.5 million profit from the federal participation.

This legislative history and intent is significant in light of the fact that it strives to accomplish the same goal as insurance, *i.e.*, to make the insured whole again. Washington is placed in the enviable position of having duplicative coverage and double recovery for the same loss. The end result is the State has the bridge and the insurance proceeds as well. The State is therefore unjustly enriched by the implementation of two forms of coverage which serve identical and congruent purposes, *i.e.*, to put the State back where it started before the bridge was destroyed. It is for this reason that State insurance proceeds are qualitatively different than other forms of state funding and should not be considered a State "cost of construction."

B. The Ninth Circuit Erroneously Granted Undue Deference to Agency Interpretation of 23 U.S.C. §§ 301 and 129(a).

Although the Court of Appeals gave lip service to the proposition that judicial deference does not displace judicial analysis (App. A, *infra*, p. 23a), the Court in fact deferred to the erroneous final interpretation embodied in the § 129(a) agreement.

This Court addressed the question of judicial deference to agency interpretations in *Securities Industry Association v. Board of Governors*, 468 U.S. 137, 104 S. Ct. 2979, 82 L. Ed. 2d 107 (1984):

> We've also made clear, however, that deference is not to be a device that emasculates the significance of judicial review. Judicial deference to an agency's interpretation of a statute "only sets the 'framework for judicial analysis; it does not displace it'." *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24, 102 S. Ct. 821, 827, 70 L. Ed. 2d 792 (1982), *quoting United States v. Cartwright*, 411 U.S. 546, 550, 93 S. Ct. 1713, 1716, 36 L. Ed. 2d 528 (1973).

> A reviewing Court "must reject administrative constructions of [a] statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 102 S. Ct. 38, 42, 70 L. Ed. 2d 23 (1981).

The matter was simply stated by this Court in *Morton v. Ruiz*, 415 U.S. 199, 94 S. Ct. 1055, 1075 39 L. Ed. 2d 270 (1974), where the Court held: "In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose."

Petitioners submit that agency interpretation should be ignored in the present case due to the fact that:

(a) Section 129(a) has subsequently been applied by the FHWA to exclude state insurance proceeds from a state's cost of construction. *See* Florida Sunshine Skyway Bridge, 129(a) Agreement. The agreements for the Florida Skyway Bridge and the Washington Hood Canal Bridge are the only two 129(a) agreements which address the issue of insurance as a cost of construction.

(b) the FHWA in the instant case did not appeal the District Court's determination that the FHWA's actions were arbitrary and capricious. By accepting the District Court's construction of the statute, the current FHWA position is that insurance proceeds and interest are not part of the State's cost of construction; and

(c) the FHWA and the WSDOT have manifested several significantly different interpretations of § 129(a).[2] The FHWA

[2] Initially, the FHWA's position was that since the bridge was to be reconstructed entirely with federal funds, tolls could not continue. Next, the 129(a) agreement designated the State's insurance proceeds and interest thereon as a State cost of construction. Then it was agreed that the State could retain the insurance proceeds

(footnote continued on following page)

has no guidelines, procedures, standards, benchmarks, regulations, or policies which indicate how a 129(a) agreement is to treat insurance proceeds.

C. Because 23 U.S.C. § 129(a) Is An Exception to 23 U.S.C. § 301, It Is to Be Strictly Construed.

It is a well-settled rule of statutory construction that exceptions to legislative enactments must be strictly construed. *Schlemmer v. Buffalo R & P Railway*, 205 U.S. 1, 27 S. Ct. 407, 51 L. Ed. 68 (1907). The Opinion of the Ninth Circuit fails to make any reference to this well-accepted rule of statutory construction.

One of the overriding policies behind the legislation in question is the specification in 23 U.S.C. § 301 that federally aided highways and bridges shall be toll-free. Congress, in its wisdom, made one narrow exception to that policy. It allows the State to recoup its costs of construction. The Ninth Circuit interpreted this exception so broadly as to swallow the mandate of § 301.

Since Title 23 does not require 100% federal funding of ER projects, the statutory scheme recognizes that a State may

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until final completion of the entire bridge and the interest could be used by the State to pay its 20% share needed to receive federal discretionary funds. Subsequently, the FHWA changed its position and said the insurance proceeds could be kept only until September 30, 1985. (Findings of Fact No. 12). Soon thereafter, the FHWA repudiated this agreement and ordered that the insurance proceeds and interest be turned over to the federal government. (Finding of Fact Nos. 13 and 15). This new position was then altered to permit the State to include all of its improperly accrued interest as a State cost of construction. Finally, the FHWA indicated that only a portion of the interest could be called a cost of construction. The numerous positions taken by the administrative agencies involved failed to show any consistency which would justify judicial deference.

be required to invest matching funds to partially pay for the reconstruction of a facility. Similarly, the original costs of construction may not have been paid off. The purpose of 23 U.S.C. § 129(a) is to allow repayment to the State from toll revenues, money it has invested, or costs incurred in the reconstruction; or originally unrecovered construction costs. These statutes were designed to protect the public, not to allow repayment to WSDOT of "costs" when the WSDOT did not incur any costs nor invest any money in the reconstruction.

The phrase "costs of construction" is not defined in Title 23 U.S.C. However, the concept that a cost must be incurred by the WSDOT for it to be a "cost of construction" repayable to the WSDOT is supported by the statutory definition of "construction" in 23 U.S.C. § 101(a):

> The term "construction" means the supervising, inspecting, actual building, and all *expenses* incidental to the construction or reconstruction of a highway . . . the term also includes . . . *costs incurred by the state* performing federal aid project-related audits which directly benefit the Federal Aid Highway Program. (Emphasis added.)

(App. E, *infra*, p. 54a.)

The concept that costs must be incurred is reflected within the above definitional section of the statute.

Additionally, 23 CFR § 668.107(b) supports Petitioners' construction of 23 U.S.C. § 129(a). The federal regulation makes reference to the "*costs of reconstruction.*" Section 668.107(b) provides in part:

> The *federal share* payable for repair or *reconstruction* of highways . . . shall ordinarily not exceed 75 percent of the *cost thereof.* . . . When special circumstances warrant, the Federal Highway Administrator may determine it to be in the public interest to increase the *federal share* [payable for the cost of reconstruction]. (Emphasis added.)

(App. E, *infra*, p. 57a.)

Pursuant to this section and 23 U.S.C. § 120(f), the FHWA decided to increase the federal share payable for the "cost of reconstruction" to 100%. Thus, the plain language of the regulation dictates that the federal share payable for reconstruction of the bridge was 100%.

The Appellate Court's construction is further flawed by its seemingly interchangeable use of the terms "contribution" and "cost of construction." (App. A, *infra*, pp. 23a–30a.) Nowhere in 23 U.S.C. § 129(a) is the term "contribution" used in reference to a State paying part of its expenses of construction. The use of the term "contribution" is made solely in reference to the federal government's share. By focusing on the State's "contribution," the Appellate Court improperly placed emphasis on the wrong matter, *i.e.*, how much of the $160 million costs of construction were in some remote way attributable to the State? Petitioners contend that in light of the Congressional intent to make the States whole and the plain meaning of the statutory language, the focus of the Court's analysis should be on the actual loss to the State. "Costs of construction," for purposes of 23 U.S.C. § 129(a), should include only those sums which are necessary to make the State whole again. As discussed above, no costs of construction have been incurred when insurance proceeds are at issue because 100% federal funding has put the State back in its original position.

D. The Appellate Court's Opinion Sanctions Absurd and Freakish Results.

This Court has often reiterated the rule that interpretations of statutes which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 565, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982).

It is instructive to examine the consequences of the Appellate Court's interpretation and application of 23 U.S.C. § 129(a). The bizarre consequences of the Appellate Court's holding are neither discussed nor alluded to in its Opinion.

The State started with a bridge insured with premiums paid from motorists' bridge tolls. The bridge was subsequently destroyed and, pursuant to the Appellate Court's analysis, the State now has a bridge *and* over $30 million to spend as it chooses. To make matters worse, the same citizens who paid the premiums to purchase the insurance now have to match the amount of the insurance proceeds through the payment of more tolls. Petitioners submit this is an absurd result, derogates from Congressional intent, and flies in the face of public policy. The purpose of insurance is to benefit and protect the public, not to punish it as it is done here.

CONCLUSION

This Court is respectfully requested to grant Petitioners' Petition for Writ of Certiorari and reverse the Opinion of the Court of Appeals for the Ninth Circuit and reinstate the Decision and Order of the District Court for the Western District of Washington.

DATED this 31st day of October, 1988.

Respectfully submitted.

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Attorneys for Petitioners
and Counsel of Record (*)

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLALLAM COUNTY, et. al.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION, OF THE STATE OF WASHINGTON, et al.,	)	
	)	
Defendants-Appellants.	)	No. 85-4124
	)	
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,	)	D.C. Nos. C84-768T C84-885T
	)	
Plaintiff-Appellant,	)	
	)	OPINION
v.	)	
	)	
FEDERAL HIGHWAY ADMINISTRATION and RAY A. BARNHART, Administrator,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted
September 3, 1986--Seattle, Washington

Filed June 14, 1988

Before: Betty B. Fletcher, Warren J. Ferguson and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Fletcher

SUMMARY

Administrative Law

Reversal and remand of an injunction prohibiting the State from collecting tolls on the Hood Canal Bridge. The court held that 23 U.S.C. § 129(a) permits the State to charge tools (sic) to recoup the amount contributed.

A storm partially destroyed the Hood Canal Bridge. The State received insurance proceeds for the damage. The Federal Highway Administration (FHWA) awarded the State federal emergency relief funds to reconstruct the bridge. To reduce the federal government's contribution, the State agreed to transfer the insurance proceeds to the FHWA. The State executed a 129(a) agreement authorizing the State to collect tolls on the

reconstructed bridge until the State recovered the outstanding costs. Plaintiffs sued alleging that the 129(a) agreement violated 23 U.S.C. §§ 129(a) and 301. The State and FHWA filed cross-motions for summary judgment. The district court granted the plaintiffs' motion and permanently enjoined the State from collecting additional tolls on the Hood Canal Bridge.

[1] The eleventh amendment prohibits actions against a state or state agency in federal court. Eleventh amendment immunity, however, may be waived. [2] Neither the State nor the agency waived the immunity, Congress has not expressed an intent to abrogate state immunity, nor does Title 23 condition receipt of highway funds on a state's waiver. [3] The eleventh amendment, however, does not preclude suit against a

state official in federal court if the relief sought is prospective. Thus, the eleventh amendment does not bar plaintiffs' action against the state official for prospective injunctive and declaratory relief but would bar an award of damages. [4] Individuals have an express cause of action under section 1983 against state officials for deprivation of rights, privileges and immunities secured by federal statutes. In *Sea Clammers*, the court identified two exceptions to the availability of section 1983. [5] Because Congress has not provided a comprehensive scheme providing for enforcement of section 301, the first *Sea Clammers* exception does not bar a private right of action under section 1983. [6] The language of section 301 mandates that federally funded bridges be toll free. This section creates enforce-

able rights. Accordingly, neither of the *Sea Clammers* exceptions applies and plaintiffs may assert a private right of action under section 1983 to enforce section 301. [7] Excluded from section 301 are certain toll bridges as provided in section 129(a). When a state combines its own funds with federal funds to build a toll bridge, the State may charge tolls up to the amount necessary to recoup the state's contribution toward costs of contribution.

COUNSEL

Thomas R. Garlington, Senior Assistant Attorney General, Olympia, Washington, for the defendants-appellants.

Mark E. Fortier, Kargianis & Austin, Seattle, Washington, for the plaintiffs-appellees.

OPINION

FLETCHER, Circuit Judge:

The Washington State defendants appeal the district court's interlocutory order granting a permanent injunction that prohibits the State from collecting tolls on the Hood Canal Bridge. The State contends that the district court misapplied 23 U.S.C. § 129(a) of the Federal Highway Act, 23 U.S.C. § 101 *et seq.*, in failing to consider the State's insurance proceeds and interest as "costs of construction." We agree.

FACTS

The Hood Canal Bridge is a mile-and-a-half long floating bridge linking portions of the upper Olympic peninsula in Washington State. It replaces an earlier bridge that was substantially destroyed

in a storm. To finance the original bridge, the State combined its costs with capital costs for the ferry system, issuing bonds worth $30.5 million in 1957. The bonds were refunded in 1961. The new bonds were forty-year term bonds maturing in 2002. The State charged tolls on the bridge, and used the revenue for bridge maintenance and operation costs, including insurance premiums, with most of any remaining net revenue used to pay the principal and interest on the bonds. In accordance with bond covenants, the State insured the bridge and provided that any insurance proceeds to compensate for physical damage to the bridge would be expended either to reconstruct the bridge or to retire outstanding bonds.

On February 13, 1979, high tides and hurricane force winds destroyed the western half of the bridge. The State

received $30.5 million in insurance proceeds for the damage. The Federal Highway Administration (FHWA) awarded the State federal emergency relief funds to reconstruct the bridge. To reduce the federal government's contribution, the State agreed to transfer the insurance proceeds to the FHWA. Pursuant to 23 U.S.C. § 129(a), FHWA and the State executed a "129(a) agreement" authorizing the State to collect tolls on the reconstructed bridge until the State recovered approximately $8 million in outstanding costs from the original bridge (the cost of the original bridge less tolls collected) and $30.5 million in insurance proceeds, plus interest. In October 1982, the State reopened the Hood Canal Bridge as a toll bridge.

After various proceedings in state and federal court,[1] plaintiffs filed this action in federal court against Washington State, the Washington State Department of Transportation (WSDOT), the Secretary of WSDOT, and FHWA seeking injunctive and declaratory relief and damages. Plaintiffs filed a motion for partial summary judgment in which they alleged that the 129(a) agreement violated 23 U.S.C. §§ 129(a) and 301, in that the State was prohibited from collecting tolls to recover the amount of the insur-

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1 Plaintiffs originally filed a state court action against Washington State and the Washington Department of Transportation, challenging the State's authority to continue collecting tolls on the bridge. After the State defendants moved to join FHWA as a party, the plaintiffs added FHWA as a defendant. FHWA then removed the action to federal court. The district court dismissed the case and remanded it to state court on the ground that the state court lacked jurisdiction over the federal defendant. The state court determined that the action should not be dismissed from state court even though FHWA could not be sued in state court because the FHWA was not an indispensable party. When FHWA announced that it had changed its position on the amount of interest recoverable through tolls, the State defendants renewed their motion to join the FHWA as an indispensable party. On its own motion, the state court granted a stay of the state action to allow the plaintiffs to refile in federal court where FHWA could be made a party.

ance proceeds that had been transferred to FHWA by the State. The State and FHWA filed cross-motions for summary judgment. After a hearing, the district court granted the plaintiffs' motion and permanently enjoined the State from collecting additional tolls on the Hood Canal Bridge. The court determined that the state's "costs of construction" consisted of the $8 million in unrecovered costs from the original bridge, but not the $30.5 million in insurance proceeds plus interest, and that inclusion of the latter in the State's "costs of construction" violated 23 U.S.C. §§ 129 and 301. The State timely appeals.[2]

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2 FHWA also filed a timely notice of appeal, but later filed a stipulated dismissal of its notice.

DISCUSSION

I. *Eleventh Amendment*

Plaintiffs brought this suit against the State, WSDOT, the Secretary of WSDOT, and FHWA seeking injunctive and declaratory relief and damages. Upon plaintiffs' motion, the district court granted a permanent injunction against the State defendants. We must consider whether the eleventh amendment bars plaintiffs' action against the State defendants, even though the issue was not raised in the district court. *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974).

[1] As a general rule, the eleventh amendment prohibits actions against a state or state agency in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 97-99 (1984); *Doe v. Maher*, 793 F.2d

1470, 1493 (9th Cir. 1986). Eleventh amendment immunity is waived, however, if (1) the state expressly waives its general immunity to suit in federal court; (2) Congress expresses its intent to abrogate states' immunity pursuant to section 5 of the fourteenth amendment[3]; or (3) the act manifests a clear intent to condition a state's receipt of federal benefits on the state's waiver of its immunity. *Maher*, 793 F.2d at 1494. We conclude that the eleventh amendment bars suit against the State and the state agency in federal court.

[2] Neither the State nor the agency waived the eleventh amendment immunity. Although counsel for the

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3 Because we conclude infra that Congress has not expressed in Title 23 an intent to abrogate state sovereign immunity, we need not reach the question of whether Congress has the power under the Commerce Clause to abrogate states' eleventh amendment immunity. Cf. United States v. Union Gas Co., 832 F.2d 1343 (3rd Cir. 1987) (concluding that Congress does have such power under the Commerce Clause).

defendants including the State made representations to the state court indicating a willingness to proceed in federal court and argued to the federal court, in support of a stay, that plaintiffs, if successful on the merits, would be protected because the State would agree to refund tolls collected during the pendency of the litigation, it is unclear whether these statements constituted a waiver of immunity, *see Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975), or rather were simply a recognition that the suit could proceed in federal court against the department head. In light of this ambiguity, we do not find a waiver "unequivocally expressed." *Pennhurst*, 465 U.S. at 99. Further, Congress has not expressed an intent to abrogate state immunity, nor does Title 23 condition

receipt of highway funds on a state's waiver. Because we find no basis for holding that immunity was waived, suit against the State of Washington and WSDOT is barred by the eleventh amendment.

[3] The eleventh amendment, however, does not preclude suit against a state official in federal court if the relief sought is prospective, *Green v. Mansour*, 106 S. Ct. 423, 426 (1985); *Edelman*, 415 U.S. at 664, because, when a violation occurs, relief is "necessary to vindicate the federal interest in assuring the supremacy of that law." *Green*, 106 S. Ct. at 426 (citations omitted). Even though there may be fiscal effects on the state treasury incident to a prospective remedy, this fact does not reconstruct the barrier of the eleventh amendment immunity against prospective orders necessary to effect compliance with federal law. *Almond High School v.*

United States Dept. of Agriculture, 768 F.2d 1030, 1034 (9th Cir. 1985). Thus, the eleventh amendment does not bar plaintiffs' action against the state official for prospective injunctive and declaratory relief but would bar an award of damages.

II. *Private Right of Action*

At oral argument, we requested supplemental briefing addressing the issue of whether plaintiffs have a private right of action. Having fully considered the parties' arguments, we conclude that 42 U.S.C. § 1983 provides an express right of action to enforce 23 U.S.C. § 301.[4]

[4] The Supreme Court in *Maine v. Thiboutot*, 448 U.S. I (1980), recognized

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4 We therefore need not consider whether 23 U.S.C. §§ 301 and 129(a) provide an implied right of action, nor whether the administrative Procedure Act, 5 U.S.C. § 702, applies. See Middlesex County Sewerage Auth. v. National Sea Clammers Assoc., 453 U.S. I, 19 (1980).

that individuals have an express cause of action under section 1983 against state officials for deprivation of rights, privileges and immunities secured by federal statutes. In *Middlesex County Sewerage Auth. v. National Sea Clammers Assoc.*, 453 U.S. I (1981) (*Sea Clammers*), the Court identified two exceptions to the availability of section 1983 to redress violations of federal law:

> (i) [where] Congress had foreclosed private enforcement of [the] statute in the enactment itself, and (ii) [where] the statute at issue. . .was the kind that [did not create] enforceable "rights" under § 1983.

Sea Clammers, 453 U.S. at 19. Neither of the exceptions identified in *Sea Clammers* bars an express cause of action under section 1983.

Plaintiffs' contention that they are entitled to be free from tolls arise from

the general proscription of section 301.[5] Section 129(a) creates an exception to section 301 and can be raised as a defense to an action claiming a violation of section 301. Section 301, then, would provide the predicate right, if any, giving rise to an action under section 1983. That the government defends on the basis that the exception applies does not change the analysis. We therefore consider whether plaintiffs have a private right of action to enforce section 301.

[5] The State properly does not argue that the first exception applies. Congress has not provided a comprehensive scheme to enforce section 301, *see Sea Clammers*, 453 U.S. at 13-14, 20; *Keaukaha-Panaewa*, 739 F.2d at 1471;

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5 Section 301: "Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds." The term "highway" includes bridges. See 23 U.S.C. § 101(a).

indeed, Congress has provided no express remedy under Title 23. We therefore conclude that the first *Sea Clammers* exception does not bar a private right of action under section 1983.

The second exception--whether statute was the kind that did not create enforceable rights--seems tautological. Our court, however, has interpreted the requirement as similar to the "specially benefited class" prong of *Cort v. Ash*, 422 U.S. 66 (1975), which establishes guidelines for determining whether a statute provides an implied private cause of action. *See, e.g., Coos Bay Care Center v. Oregon Dept. of Human Resources*, 803 F.2d 1060, 1062-63 (9th Cir. 1986). A critical inquiry is whether Congress mandated an entitlement or merely encouraged certain activity. *Wright v. City of Roanoke Redev. & Hous. Auth.*, 107

S. Ct. 766, 770-71 (1987); *Keaukaha-Panaewa*, 739 F.2d at 1471 (citing *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 18 (1981). We must also determine whether plaintiffs are members of a particular class that Congress intended to benefit. *Coos Bay*, 803 F.2d at 1063.

[6] The language of section 301 mandates that federally funded bridges have a particular attribute--that they be toll free. In determining whether this section creates enforceable rights, we find our recent decision in *Coos Bay*, 803 F.2d at 1063, instructive. In *Coos Bay*, we held that health-care providers and individual Medicaid recipients may stand as co-plaintiffs to assert a cause of action under section 1983 to enforce section 1396a(a)(13)(A) of the Social Security Act, 42 U.S.C.

§ 1396a(a)(13)(A), because they have "parallel interests with respect to Medicaid funding and reimbursement." *Id.* Similarly, users of federally funded bridges have an obvious financial interest in toll-free bridges and are the primary beneficiaries of section 301. The purpose of maintaining toll-free bridges is to aid bridge users, by providing free access across waterways like Hood Canal. *See Cohen v. Massachusetts Bay Transp. Auth.*, 647 F.2d 209, 212 (1st Cir. 1981) (court held transit riders were particularly benefited by informed decisionmaking required by the Urban Mass Transportation Act of 1964 mandating transportation authority to give Secretary of Transportation assurances that no substantial service changes would be made

without public hearing).[6] The fact that the class of users is large does not prevent the class from appropriately being considered "specially benefited." *Id.* In this case, the class of bridge users is readily identifiable. We conclude that plaintiffs are members of a class granted enforceable rights. Because neither of the *Sea Clammers* exceptions applies, plaintiffs may assert a private right of action under section 1983 to enforce section 301.

6Rapid Transit Advocates, Inc. v. Southern California Rapid Transit District, 752 F.2d 373, 377-78 (9th Cir. 1985) cites and distinguishes this case on its facts. In Rapid Transit, our court held that local residents and mass transit users were not particularly benefited by a provision of the Urban Mass Transportation Act of 1964 that states that the purpose of the Act is to encourage the establishment of mass transit systems nor a provision requiring each grant application to certify that the applicant has considered the economic and social effects of the project and its impact on the environment and has found the project consistent with official plans for the comprehensive development of the urban area.

III. *The 129(a) Agreement*

We afford considerable deference to an agency's[7] interpretation of the statute it administers. *Hawaiian Elec. Co. v. United States Environmental Protection Agency*, 723 F.2d 1440, 1470 (9th Cir. 1984). Judicial deference, however, does not displace judicial analysis, and we must reject agency interpretations "that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Securities Indus. Assoc. v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 143 (1984) (citations omitted). We will otherwise uphold agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in

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7 This suit involves the coordinated action of a federal agency and a state agency. The standard of review of agency action for either is essentially the same. Because their interpretation of the statute, with one exception which has been resolved, is the same, we will consider their action together.

accordance with law." 5 U.S.C. § 706(2)(A).

[7] Section 301 sets forth a general congressional policy that federally funded highways and bridges "shall be free from tolls of all kinds." 23 U.S.C. § 301. Excluded from the mandate of section 301, however, are "certain toll bridges" as provided in section 129(a). *Id.* Under section 129(a), when a state combines its own funds with federal funds to build a toll bridge, the state may charge tolls up to the amount necessary to recoup the state's contribution toward "costs of construction.[8]

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8 Section 129(a) provides in relevant part:

(a) Notwithstanding the provisions of section 301 of this title, the Secretary may permit Federal participation. . .in the construction of any toll bridge. . .upon compliance with the conditions contained in this section. Such bridge. . .must be publicly owned and operated. . . .The State highway department or departments must be a party or parties to an agreement with the Secretary whereby it or they undertake performance of the following obligations:

(1) all tolls received from the operation of the bridge. . .less the actual cost of such operation and maintenance, shall be applied to the repayment to the State or other public authority of all of the costs of construction or acquisition of such bridge. . ., except that part which was contributed by the United States;

FHWA & WSDOT interpreted section 129(a) as allowing the State to exact tolls to recover a sum equal to the insurance proceeds it contributed and interest, and executed a "129(a) agreement" consistent with their interpretation. The agencies' interpretation is in accordance with the law, and their action is not otherwise arbitrary, capricious, or an abuse of discretion.

The plain meaning of section 129(a), *see Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[u]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary common meaning"),

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(Continued)

> (2) no tolls shall be charged for the use of such bridge. . .after the State or other public authority shall have been so repaid; and
>
> (3) after the date of final repayment, the bridge. . .shall be maintained or operated as a free bridge. . . .

permits a state to charge tolls to repay a state for its "costs of construction." The statutory language does not restrict the source of funding on which a state may draw in providing its contribution. Nor does the legislative history, which reflects the congressional policy of encouraging states, rather than private enterprises, to build bridges even hint at such a restriction. H. Rep. No. 2109, 69th Cong., 2d Sess. 3 (1927).[9] To limit a state's source of funding would necessarily impede or prevent some states from participating in the federal program, thereby frustrating, rather than enhanc-

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9 "[W]ith the growth of the automobile industry and the general improvement in the Highways of the country and the increase in transportation of persons and property by bus and truck, there is a general demand for the construction of bridges over the waterways of the country and avoiding the delays and the damages that are incident to anticipated ferry systems. But so long as the States or the counties cannot use any of the Federal-Aid funds allotted to them either for the construction of toll bridges or for the construction of roads leading to or from toll bridges, the States and counties will not themselves construct bridges, but will leave such improvements to be made by private capital. . .
H. R. No. 2109, 69th Cong., 2d Sess. 3 (1927).

ing congressional policy. Accordingly, if the State is the source of funds that have been applied toward the cost of constructing the bridge, section 129(a) permits the State to charge tolls to recoup the amount contributed and expended.

Plaintiffs, however, argue that 23 C.F.R. § 668.105(d)[10] creates an exception to this analysis. Plaintiffs argue that because section 668.105(d) prohibits federal emergency funds from duplicating insurance proceeds, the state's "contribution" does not include such proceeds. The purpose of section 668.105(d) is to preserve federal emergency funds, when a state has ready access to funds. The section simply does not speak to the

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10 23 C.F.R. § 668.105(d) implements 23 U.S.C. § 125, which authorizes federal emergency funds. The federal contribution to rebuild the Hood Canal Bridge came from § 125 funds.

allocation of costs between the State and bridge users under section 129(a).

Plaintiffs further contend, however, that if permitted to charge tolls, the State would receive a windfall by entitling it to both the reconstructed bridge and the insurance proceeds. But this "windfall" was precisely the result intended by Congress in authorizing the collection of tolls. Under section 129(a), any state contributing a share of the "costs of construction" may recoup the amount it contributes toward building a bridge, and still enjoy ownership of the bridge.[11]

In this case, the plaintiffs urge that the State was a mere conduit through which the insurance proceeds passed, and

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11 Plaintiffs' additional assertion that the State is prohibited from using revenues it collects from tolls to fund the ferry system is without merit. Section 129(a) limits the amount of toll revenue a state may collect, but does not dictate how the state may use the revenue once collected.

that the State did not have title to them. We disagree. The State was owner of the insurance policy and paid premiums on it. When the bridge collapsed, the State received the proceeds as beneficiary. Apart from the obligations in the bond indenture to use $8 million to pay off the bonds if it did not rebuild the bridge, once the funds entered the State Treasury, the State could have applied them to any number of projects. That the State chose to request federal emergency aid and contribute the total proceeds toward reconstructing the Hood Canal Bridge did not divest the State of title.

The history whereby the State became entitled to the insurance proceeds is informative. The first Hood Canal Bridge was constructed exclusively from non-federal funds and was not subject to restraints on toll collecting. During

the years between the completion of the bridge and its destruction in 1979, the State collected many millions of dollars in tolls. The State owned the bridge, a valuable revenue-producing asset. Upon the bridge's collapse, insurance proceeds were substituted for the bridge itself. Like the bridge, the insurance proceeds were a capital asset of the State. It was this capital that the State expended toward reconstruction of the bridge.

In order to collect tolls pursuant to section 129(a), the State must have expended its own funds in reconstructing the bridge. The State meets this prong of the test handily. The State transferred nearly $30 million in cash to FHWA to reimburse FHWA for its outlay of federal emergency funds to construct the bridge and assumed responsibility for directly paying $11.6 million to complete

construction.[12] We conclude that the State expended the insurance proceeds and interest as "costs of construction" for purposes of section 129(a).

CONCLUSION

Because the State had title to the insurance proceeds and interest and expended them toward reconstructing the bridge, we conclude that these funds should be considered "costs of construction" contributed by the State toward rebuilding the Hood Canal Bridge. Accordingly, we reverse and remand to the district court for further proceedings.

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12 According to an FHWA directive, in which the State acquiesces, some of the combined $41.6 million includes "excess interest" owned by the United States. In calculating the State's contribution toward the "costs of construction," the district court should consider the amount of insurance proceeds plus any interest that the State would have earned had the proceeds been applied immediately to the reconstruction costs, but not any additional interest that may have accrued.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON
AT TACOMA

CLALLAM COUNTY; CITY OF PORT ANGELES; FAIR TOLL COALITION; DAVID G. DOUGLAS; AND PORT OF PORT ANGELES, Plaintiffs, vs. DEPARTMENT OF TRANSPORTATION OF THE STATE OF WASHINGTON, and STATE OF WASHINGTON; DUANE BERENSON, Secretary of Department of Transportation, State of Washington; and FEDERAL HIGHWAY ADMINISTRATION, United States Department of Transportation, Defendants.	NO. C84-768T FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

THIS MATTER having come on regularly for hearing in the above-entitled Court before the undersigned judge, all parties having made cross-motions for summary

judgment; the Court having reviewed the submittals by the parties, and having reviewed the court files and records therein; the Court having granted the motion for oral argument and having heard the argument of counsel; the parties having agreed that there is no material issue of fact which would prevent this Court from rendering a decision on summary judgment; now, therefore, the Court enters the following findings of fact ~~which are agreed facts between the parties:~~

FINDINGS OF FACT

1. The State Defendants herein are the Department of Transportation of the State of Washington; State of Washington; and Duane Berenson, as Secretary of the Washington Department of Transportation, hereinafter referred to as the "State". The federal Defendant is the Federal

Highway Administration of the United States Department of Transportation, hereinafter referred to as the "Federal Highway Administration", or the "FHWA".

2. On February 13, 1979, high tides and hurricane force winds destroyed the west half of the Hood Canal Bridge.

3. On February 14, 1979, Washington State Department of Transportation Secretary William Bulley informed Paul Gregson of the FHWA of Washington's intention to seek emergency relief funds from the United States Government pursuant to Title 23 U.S.C. § 125 Emergency Relief.

4. On February 15, 1979, Governor Ray declared a state of emergency by proclamation. The State requested federal funds to reconstruct the west portion of the Hood Canal Bridge.

5. On February 14, 1979, Paul Gregson, FHWA Division Administrator,

gave authorization to the State for performance of emergency operations to effect emergency repairs, restore essential travel and protect remaining facilities, to reduce the extent of damage and begin preliminary project evaluation consisting of surveys, design, and preparation of construction plans.

6. On March 6, 1979, John Hassell, Jr., Deputy Administrator for FHWA, informed Governor Ray that, pursuant to § 125 of Title 23 U.S.C., Emergency Relief, he concurred with the Governor's proclamation and had determined the State was eligible for emergency funding under Title 23 U.S.C. § 125; however, the funding would be subject to the provisions of Title 23 U.S.C. § 129. The FHWA agreed to pay up to 100% of the eligible costs.

7. On October 5, 1979, the State received $30,540,940.00 in insurance pro-

ceeds for property damage to the Hood Canal Bridge.

8. Insurance premiums paid for by the State of Washington for the property damage insurance on the Hood Canal Bridge were part of the maintenance and operations costs of the bridge. The toll revenues from the bridge were combined with the ferry revenues and placed in the Ferry Revolving Fund. The maintenance and operations costs of both the bridge and the ferries were paid from this fund. From 1962 through 1979, the bridge had net operating revenue. From 1968 through 1979, the ferries did not have net operating revenue.

9. The first payment of Emergency Relief funds from the FHWA to the State consisted of $597.66 and was made on or about August 14, 1979. On or about March 23, 1981, the FHWA made the first

payment towards construction expenses. This payment was $227,954.00. Through May 1, 1983 all payments made by FHWA consisted of $199,467,327.69. On April 25, 1983 the State reimbursed the FHWA $29,848,986.,46 and paid an additional $11,644,986.82 towards the completion of the Hood Canal Bridge. The FHWA spent a total of $110,107,193.91 up to August 9, 1985, towards the Hood Canal Bridge.

10. Design and reconstruction costs associated with the Hood Canal Bridge were submitted by the State to the FHWA and reimbursed with Title 23 funds. The first payment of federal monies to the State for these costs occurred on March 10, 1980, in the amount of $88.00. The next payment of federal funds occurred on May 19, 1980, in the amount of $340,550.38.

11. On May 20, 1980, the State and the FHWA entered into an agreement pursuant to Title 23 U.S.C. § 129(a), commonly known as the 129(a) agreement. The agreement set forth the conditions under which the State could collect tolls on the rebuilt Hood Canal Bridge. The agreement provides that the property damage insurance proceeds and interest thereon shall be deemed construction costs paid by the State. This allowed the State to collect tolls in an amount equal to the insurance and interest thereon. The agreement sets forth the conditions under which the State can collect tolls on the rebuilt bridge:

Unrecovered construction costs from original bridge	Approx. $7,885,537.
Property damage insurance proceeds	Approx. $30,505,000.
Interest on insurance proceeds	Unknown at that time.

12. The State initiated efforts to obtain additional discretionary funding from the FHWA to replace the east half of the bridge.

In a letter dated August 21, 1980, then Secretary of Transportation of the State of Washington, William Bulley, requested that the State be allowed to retain the $30.5 million received from the insurance proceeds. It was requested that the money be held at interest until final completion of the reconstruction of the east half of the bridge. The State of Washington wanted to utilize the interest earned on the insurance proceeds to pay the State's 20% share which would be required when using federal discretionary funds to rebuild the east span of the Hood Canal Bridge.

On September 8, 1980, FHWA Administrator John Hassell informed

William Bulley that he concurred with the funding proposals presented in Mr. Bulley's letter; however, the insurance proceeds were to be paid back no later than September 30, 1985.

13. On September 14, 1981, FHWA Chief Counsel Donald Ivers determined that former administrator John Hassell illegally exceeded the scope of his administrative authority by agreeing that the State of Washington could retain the insurance proceeds until the entire bridge was reconstructed and use the interest earned thereon as a match for discretionary funds.

14. In an independent audit by the Office of the Inspector General, dated December 23, 1981, the Inspector General concluded that the agreement regarding the interest between the State and

Hassell was contrary to federal regulations.

15. On February 8, 1982, R. A. Barnhart, FHWA Administrator, instructed Mr. Eldon Green, Regional Highway Administrator, to expeditiously recover from the State of Washington the insurance proceeds and interest incurred thereon to comply with FHWA policy. Subsequent negotiations occurred between the State and the FHWA regarding the date the monies were to be returned to the federal government. They agreed on a repayment date of April 25, 1983.

16. On October 23, 1982, the Hood Canal Bridge reopened for regular vehicular traffic.

17. On April 25, 1983, the State of Washington issued a warrant to the FHWA for $29,848,986.46. Additionally, the FHWA was no longer obligated on the Hood

Canal Bridge project in the amount of $11,644,986.82.

18. The following figures summarize the insurance proceeds and interest thereon, and the payment of those amounts to the FHWA:

$30,504,940.00	Insurance proceeds received from insurance carried for property damage of the Hood Canal Bridge.
$10,989,033.26	Interest accrued on the insurance proceeds from October 19, 1979, to April 25, 1983.
$41,493,973.26	Total insurance proceeds received and interest accrued.
$29,848,986.44	Total funds repaid to the FHWA by the State on April 25, 1983.
$11,644,986.82	State payment of FHWA commitments to fund the Hood Canal Bridge project.
$41,493,973.26	Total

19. By October 24, 1983, the FHWA and the State agreed to supplement the

129(a) agreement by establishing that the unrecovered construction costs on the Hood Canal Bridge were $8,175,468.18, instead of the $7,885,537.00 figure in the May 20, 1980, agreement.

20. The net toll revenues collected from the Hood Canal Bridge from its reopening on October 23, 1982, through April 30, 1985, are $9,125,144.00. This figure is not a final audited amount, but is believed to be substantially correct. This amount $9,125,144.00 exceeds the unrecovered construction costs of the bridge.

Based on the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to Title 28 U.S.C. §§ 1331, 1346 and 1343. The cross-motions for summary judgment in effect asked the Court to

construe two federal statutes which control the legal issues in this case. The two statutes are Title 23 U.S.C. § 301 and Title 23 U.S.C. § 129(a).

2. All Findings of Fact more appropriately deemed Conclusions of Law, are hereby incorporated as such.

3. Federal law is applicable and controlling in this case because federal funds were used to rebuild the Hood Canal Bridge. Once the state applies for and uses federal money available under Title 23 to build or rebuild a bridge, then federal law applies and must be followed by the state.

4. The federal statute codified at Title 23 U.S.C. § 301 sets forth the general congressional policy that federally funded highways and bridges are to be toll-free. This policy applies to the Hood Canal Bridge. Title 23 U.S.C. § 301

grants to the public the right of toll-free passage across bridges, such as the Hood Canal Bridge, that are federally funded under the provisions of Title 23.

5. The general policy of toll-free highways and bridges embodied in Title 23 U.S.C. § 301 is subject to an exception codified at Title 23 U.S.C. § 129, which allows federally funded bridges to be toll bridges in certain circumstances. Toll bridges constructed with federal funds should be made toll-free as soon as possible.

6. Exceptions to legislative enactments are to be strictly construed. Since Title 23 U.S.C. § 129(a) is an exception to the general statute and policy in Title 23 U.S.C. § 301, and Title 23 U.S.C. § 129(a) must be strictly and narrowly construed.

7. The insurance proceeds and interest thereon are not the State's

costs of construction to be repaid to the State from tolls on the Hood Canal Bridge pursuant to Title 23 U.S.C. § 129(a).

8. The inclusion of the insurance proceeds and interest thereon in the May 20, 1980 agreement (commonly referred to as the 129(a) agreement) is in violation of Title 23 U.S.C. § 301 and Title 23 U.S.C. § 129(a).

9. After the expenditure of any federal emergency funds, the actions by the FHWA in allowing the State to claim the insurance proceeds and interest thereon as part of its costs of construction, is arbitrary, capricious and contrary to law and, therefore, should be set aside.

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED THAT:

1. The Plaintiffs' Motion for Partial Summary Judgment is GRANTED;

2. The State's Cross-Motion for Partial Summary Judgment is DENIED; and

3. The FHWA's Cross-Motion for Partial Summary Judgment is DENIED.

DATED at Tacoma, Washington this 15th day of August, 1985.

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLALLAM COUNTY; CITY OF PORT ANGELES; FAIR TOLL COALITION; DAVID G. DOUGLAS; and PORT OF PORT ANGELES, Plaintiffs, v. DEPARTMENT OF TRANSPORTATION OF THE STATE OF WASHINGTON, and STATE OF WASHINGTON; DUANE BERENSON, Secretary of Department of Transportation, State of Washington, United States Department of Transportation, Defendants.	)	NO. C84-768T NO. C84-885T (Class Action) FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PERMANENT INJUNCTION
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Plaintiff, v. FEDERAL HIGHWAY ADMINISTRATION; and RAY BARNHART, Administrator, Federal Highway Administration, Defendants.	)	

THIS MATTER having come on regularly for hearing in the above-entitled court before the undersigned judge; the plaintiff class having moved this court for a permanent injunction against the State defendants; the court having reviewed the submittals by the parties, and the court having reviewed the court files and records therein; and being otherwise fully advised; now, therefore, the court enters the following findings of fact which are agreed facts between the parties:

FINDINGS OF FACT

I

This court has previously entered findings of fact on August 15, 1985, ~~which were agreed facts between the parties~~. Those facts form the partial

basis for the court's ruling herein, and are incorporated by this reference.

II

Since the reopening of the rebuilt Hood Canal Bridge, in October of 1982, the State has already collected net tolls on the bridge in excess of its costs of construction, the amount allowable under 23 U.S.C. § 301 and 23 U.S.C. § 129(a).

Based upon the foregoing findings of fact, the court now enters the following:

CONCLUSIONS OF LAW

1. On August 15, 1985, the court has previously entered conclusions of law which partially form the basis for the court's ruling herein. Those conclusions are incorporated herein by this reference.

2. 23 U.S.C. § 129(a)(2) requires that no tolls be charged on the Hood Canal Bridge after the State has been

repaid its costs of construction. Since the State has been so repaid, federal law requires the bridge to be toll-free.

3. The tolls currently being collected on the Hood Canal Bridge are illegal and contrary to the congressional policy expressed in 23 U.S.C. § 301 and 23 U.S.C. § 129(a).

4. In order to give effect to the declared policy of Congress embodied in 23 U.S.C. § 301 and 23 U.S.C. § 129(a), and after weighing the equities, this court concludes that the State should be permanently enjoined from collecting tolls on the Hood Canal Bridge.

Based on the foregoing findings of fact and conclusions of law;

IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendants Department of Transportation of the State of Washington; State of Washington; and Duane

Berenson, Secretary of the Department of Transportation of the State of Washington, are hereby permanently enjoined from collecting tolls for use of the Hood Canal Bridge.

DONE IN OPEN COURT this 29th day of August, 1985.

JACK L. TANNER, JUDGE

Presented by:

KARGIANIS & AUSTIN

By_____
Mark E. Fortier
Attorneys for Plaintiffs

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLALLAM COUNTY, CITY OF PORT ANGELES, et al., Plaintiffs-Appellees, vs. DEPARTMENT OF TRANSPORTATION OF THE STATE OF WASHINGTON and STATE OF WASHINGTON, et al., Defendants-Appellants.	NO. 85-4124 D.C. No. C 84-768T C 84-885T
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Plaintiff-Appellant, vs. FEDERAL HIGHWAY ADMINISTRATION and RAY A. BARNHART, Administrator, Defendants-Appellees.	ORDER

Before: FLETCHER, FERGUSON and REINHARDT, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

23 U.S.C. § 101(a) provides in pertinent part:

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the National Oceanic and Atmospheric Administration in the Department of Commerce) resurfacing, restoration, and rehabilitation, [,] acquisition of rights-of-way, relocation assistance, elimination of hazards of railway grade crossings, acquisition of replacement housing sites, acquisition and rehabilitation, relocation, and construction of replacement housing , and improvements which directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and passenger loading and unloading areas. The term also includes capital improvements which directly facilitate an effective vehicle weight enforcement program, such as scales (fixed and portable), scale pits, scale installation, and scale houses and also includes costs incurred by the State in performing Federal-aid project related audits which directly benefit the Federal-aid highway program.

23 U.S.C. § 120(f)

(f) The Federal share payable on account of any repair or reconstruction

provided for by funds made available under section 125 of this title [23 USCS § 125] shall not exceed 100 per centum of the cost thereof: Provided, That the Federal share payable on account of any repair or reconstruction of forest highways, forest development roads and trails, park roads and trails, parkways, public lands highways, public lands development roads and trails, and Indian reservation roads may amount to 100 per centum of the cost thereof. The total cost of a project may not exceed the cost of repair or reconstruction of a comparable facility. As used in this section with respect to bridges and in section 144 of this title [23 USCS § 144], "a comparable facility" shall mean a facility which meets the current geometric and construction standards required for the types and volume of traffic which such facility will carry over its design life.

23 U.S.C. § 129(a) (Toll Roads, Bridges, Tunnels, and Ferries.)

Notwithstanding the provisions of section 301 of this title, the Secretary may permit Federal participation, on the same basis and in the same manner as in the construction of free highways under this chapter, in the construction of any toll bridge, toll tunnel, or approach, thereto, upon compliance with the conditions contained in this section. Such bridge, tunnel, or approach thereto, must be publicly owned and operated. Federal funds may participate in the approaches to a toll bridge or toll tunnel whether such bridge or tunnel is to be or has been constructed, or acquired, by the

State or other public authority. The State highway department or departments must be a party or parties to any agreement with the Secretary whereby it or they undertake performance of the following obligations:

(1) all tolls received from the operation of the bridge or tunnel, less the actual cost of such operation and maintenance, shall be applied to the repayment to the State or other public authority of all of the costs of construction or acquisition of such bridge or tunnel, except that part which was contributed by the United States;

(2) no tolls shall be charged for the use of such bridge or tunnel after the State or other public authority shall have been so repaid; and

(3) after the date of final repayment, the bridge or tunnel shall be maintained and operated as a free bridge or free tunnel; except in the case of a bridge which connects the United States with any foreign country: Provided, That such tolls or charges do not exceed the amount necessary for the proper maintenance, repair, and operation of the bridge and its approaches under economical management: And further provided, That the entity or governmental instrumentality responsible for the operation of the portion of the bridge within the jurisdiction of the foreign country is charging tolls for the use of the bridge.

23 U.S.C. § 301 (Freedom from tolls.)

Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds.

23 CFR § 668.105(d)

Emergency funds shall not duplicate assistance under another Federal program or compensation from insurance or any other source. Partial compensation for a loss by other sources will not preclude emergency fund assistance for the part of such loss not compensated otherwise.

23 CFR § 668.107(b) provides in part:

The Federal share payable for repair of reconstruction of highways . . . shall ordinarily not exceed 75 percent of the cost thereof. . . . When special circumstances warrant, the Federal Highway Administrator may determine it to be in the public interest to increase the Federal share [payable for the cost of reconstruction].

APPENDIX F

AGREEMENT

THIS AGREEMENT made and entered into this 20th day of May, 1980, by and between the Washington State Department of Transportation, hereinafter referred to as the State, and the Federal Highway Administration, United States Department of Transportation, hereinafter referred to as FHWA;

WITNESSETH:

WHEREAS, high tides and hurricane force winds on February 13, 1979, caused conditions resulting in the catastrophic destruction of a major portion of the Hood Canal bridge on State route 104, a state highway on the federal-aid system; and, as a consequence, the State of Washington sustained a sudden and complete failure of a major segment of highway system with a disastrous impact on trans-

portation services between the counties of Washington's Olympic Peninsula and the remainder of the state; and

WHEREAS, the Governor of the State of Washington has declared these conditions to constitute an emergency and the FHWA has concurred in such declaration of emergency; and

WHEREAS, the State has submitted a program of projects to be funded with emergency relief funds as authorized by Section 125 of Title 23, U.S. Code, to provide temporary emergency restoration of transportation services and for the permanent replacement of the Hood Canal Bridge; and

WHEREAS, FHWA has approved the program of projects including the construction of a permanent replacement of the Hood Canal Bridge to be funded with emergency relief funds (which if necessary

may be combined with other available and eligible federal-aid funds); and

WHEREAS, the State has requested the concurrence of FHWA in the continuance of tolls on the permanent Hood Canal replacement bridge as authorized by Section 129 of Title 123, U.S. Code.

NOW, THEREFORE, the parties hereto agree as follows:

1. Upon the opening of the reconstructed bridge to traffic, the State may collect tolls which shall be established at a rate as determined by the Transportation Commission. The total net revenue (gross revenues less actual bridge maintenance and operation costs) from tolls which may be collected for use of the reconstructed bridge (providing that the remaining east half of the bridge is used in the reconstruction)

shall not exceed the total of two amounts computed as follows:

(a) Construction costs of the original Hood Canal Bridge plus the bond interest paid through December 31, 1978, attributable to that portion of the total bond issue ("Ferry and Hood Canal refunding Bonds of 1963"), the proceeds of which were used for the construction of the original bridge, less net bridge revenues (gross revenues less bridge maintenance and operation costs) received to February 13, 1979. In no event may the amount as computed in this clause exceed the current value of the remaining east half of the Hood Canal Bridge.

(b) The property damage insurance proceeds in the sum of $30,505,000, together with interest thereon,

received by the State as a result of the partial destruction of the original Hood Canal bridge which shall be used to pay a part of the cost of the reconstructed bridge.

Pursuant to this formula tolls may be charged for use of the reconstructed bridge until but only until net revenues therefrom total $38,390,537, plus interest received on the said insurance proceeds, which amount is determined as follows:

(a) Initial cost of H.C. Bridge (from bond proceeds)	$20,318,400
Additional appropriated funds from State to complete construction of H. C. Bridge	5,500,000
TOTAL COST OF H. C. BRIDGE	$25,818,400
Interest cost on portion of bond issue used for H. C. Bridge	

construction to Dec. 31, 1978	10,375,977	
TOTAL CONSTRUCTION AND INTEREST COSTS	$36,194,377	
Less net bridge revenue (gross revenue less maintenance and operation costs) to Feb. 13, 1979	28,308,840	
Replacement cost of east half of H. C. Bridge remaining intact	$28,800,000	
Less depreciation (20%)	5,760,000	
CURRENT VALUE OF REMAINING EAST HALF OF H. C. BRIDGE	$23,040,000	
Unrecovered construction costs of H. C. Bridge which is not in excess of current value of remaining east half of H.C. Bridge		$ 7,885,537
(b) Property damage insurance proceeds received by the State as a		

result of the partial destruction of Hood Canal Bridge	$30,505,000	
Interest on proceeds	---	
TOTAL INSURANCE PROCEEDS PLUS INTEREST		$30,505,000+
AMOUNT THAT MAY BE RECOVERED FROM NET TOLL REVENUE ON RECONSTRUCTED BRIDGE		$38,390,537 (+ int. on ins. proceeds)

The above financial information has been supplied by the State and is subject to verification by FHWA audit and will be revised if necessary to conform with the findings of such audit.

2. When the net revenues from tolls which are collected for use of the reconstructed bridge total $38,390,537, plus interest on insurance proceeds, the reconstructed bridge shall become toll free.

3. It is agreed that all property damage insurance proceeds received by the State as a result of the partial destruction of the original Hood Canal Bridge (together with the interest thereon) shall be used for reconstruction of the bridge so as to reduce the amount eligible for Federal emergency relief funds and shall be deemed construction costs paid by the State.

4. The tolls charged on the bridge shall be sufficient to allow recovery of the costs of reconstruction of said bridge paid by the State within a reasonable time.

5. No tolls may be collected for the use of the bridge after the State has been repaid as provided in this paragraph 1, and after final repayment, the bridge shall be maintained and operated as a free bridge.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed the day and year first above written.

WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION

By: _____
Secretary of Transportation

FEDERAL HIGHWAY ADMINISTRATION
UNITED STATES DEPARTMENT
OF TRANSPORTATION

By: _____

Approved as to Form:

_____
Thomas R. Garlington
Senior Assistant Attorney General
State of Washington

Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-741

No. -

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

CLALLAM COUNTY, et al.,

Petitioners/Plaintiffs,

v.

DEPARTMENT OF TRANSPORTATION OF THE STATE OF WASHINGTON,

Respondents/Defendants.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Plaintiff,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al.,

Defendants.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
RELEVANT STATUTORY PROVISIONS	1
FEDERAL JURISDICTION	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
A. The Petition Does Not Present Any Special Or Important Reasons For The Court To Grant A Writ Of Certiorari	5
B. The Ninth Circuit's Decision Is Correct	6
C. The Ninth Circuit's Decision Is Fair	7
D. The Ninth Circuit Was Entitled To Give Deference To FHWA's Interpretation Of Applicable Statutes	7
CONCLUSION	8
Appendices:	
Appendix A — Excerpt From Section 2 of the Washington Toll Bridge Authority Bond Issue	1a
Appendix B — Excerpt from Section 15 of the Washington Toll Bridge Authority Bond Issue	3a
Appendix C — Excerpt of Letter from John S. Hassell, Jr., Deputy Administrator, FHWA, to Honorable Dixie Lee Ray, Governor, State of Washington, dated March 6, 1979	6a
Appendix D — Excerpts of Memorandum from Mr. Morgan, Associate Administrator, FHWA, to L. E. Lybecker, FHWA Regional Administrator, Portland, Oregon, dated May 21, 1979	8a
Appendix E — Excerpts from Memorandum from Assistant Chief Counsel, FHWA, to Mr. Lorenzo Casanova, Chief Counsel, FHWA, dated June 20, 1979	11a
Appendix F — Excerpts from United States Supreme Court Rule 17.1	13a

TABLE OF AUTHORITIES

CASES

	Page
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L.Ed.2d 137 (1972)	8

STATUTES

23 U.S.C. § 125	3
23 U.S.C. § 129	3
23 U.S.C. § 129(a)	1, 2, 3, 5, 6, 7
23 U.S.C. § 301	1, 6, 7
28 U.S.C. § 1331	2
RCW 47.60.350	2
RCW 47.60.370	2

REGULATIONS

23 CFR § 668.105(d)	1, 2
23 CFR § 668.107(b)	6

UNITED STATES SUPREME COURT RULES

Rule 17.1(c)	1, 5

No. -

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CLALLAM COUNTY, et al.,

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DEPARTMENT OF TRANSPORTATION
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Respondents/Defendants.

WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION,

Plaintiff,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al.,

Defendants.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RELEVANT STATUTORY PROVISIONS

The pertinent provisions of the Statutes and Regulations involved are 23 U.S.C. § 301, 23 U.S.C. § 129(a), 23 CFR § 668.105(d), and United States Supreme Court Rule 17.1(c) and are set forth in Pet.'s App. E, pp. 55a-57a.

FEDERAL JURISDICTION

Original federal jurisdiction in this case rests on federal question jurisdiction under 28 U.S.C. § 1331.

STATEMENT OF THE CASE

The enactment and the content of the "129(a) Agreement" between FHWA and WSDOT on May 20, 1980 was a result of a number of communications and positions taken by FHWA immediately after the destruction of the Hood Canal Bridge.

It was clear that FHWA would grant emergency relief funds for the reconstruction of the west portion of the bridge but would require the execution of an agreement under the provisions of 23 U.S.C. § 129(a). (Pet.'s App. E, pp. 55a-56a) It was clear FHWA was not going to provide 100% funding for the entire cost because of the possibility of insurance proceeds being available to the state. This position was taken because of the language of 23 CFR § 668.105(d). (Pet.'s App. E, p.57a)

The existence of the insurance proceeds resulted from the historic actions establishing the Hood Canal bridge.

The bridge was conceived in the early 1950's. In order to make it a financially feasible project, several bond issues were converted into a single bond issue in 1961 for construction of the bridge and financing of improvements for the interdependent ferry system utilizing both toll and ferry revenues for debt service. (App. A, pp. 1a-2a) In addition to pledging of tolls and ferry system revenues, the State dedicated ¼ cent of gas tax revenue to guarantee the payment of principal and interest of the bonds by creation of the Puget Sound Reserve Account in RCW 47.60.350 and .370. The new bonds eventually issued in 1963 were 40-year term bonds maturing in 2002.

The Bond Resolution provided that all tolls and other revenues, including taxes be paid into a fund that would be used to pay the maintenance and operation costs including insurance premiums. Net revenues than go to pay principal and interest. Section 15 of the Bond Covenants provides:

> All other monies collected on any other [property damage] insurance shall, at the option of the Authority (a) be used to pay any loss suffered by the Authority for which such monies were collected, (b) be applied to replacement, reconstruction, or restoration of the property damage to at least the same good order, repair and condition as it was prior to the damage, or (c) be used to retire outstanding bonds. The Bond Resolution constitutes a contract between the State and the Bondholders.

(App. B, pp. 3a-5a)

Immediately after the Hood Canal Bridge was destroyed, Governor Ray declared an emergency on February 15, 1979 and requested that the United States Secretary of Transportation concur. On March 6, 1979 the Deputy Administrator for FHWA on behalf of the Secretary concurred with the Governor's proclamation and determined that, subject to the 23 U.S.C. § 129, the State was eligible for emergency funding under 23 U.S.C. § 125. (App. C, pp. 6a-7a) On May 21, 1979 a memorandum from Mr. Morgan, the Associated Administrator for Engineering and Traffic Operations of FHWA to Mr. L. E. Lybecker, FHWA Regional Administrator in Portland, Oregon was made available to the State. In it the insurance proceeds were discussed by Mr. Morgan stating:

> Since the insurance compensation is not specifically for another purpose, it must be used to reduce the federal share of the construction costs. The use of the insurance compensation to pay eligible construction costs would be a state cost of construction which could be recovered by collection of tolls pursuant to 23 U.S.C. § 129. Counsel should be involved in the disposition of the above toll and insurance issues.

(App. D, pp. 8a-10a)

In June of 1979, Assistant Chief Counsel of FHWA in a memorandum sent to FHWA Chief Counsel discussing a proposed 23 U.S.C. § 129(a) agreement stated that the State would be allowed to recover tolls to the State's share of the cost of construction, less operation and maintenance, were received. He stated "the insurance compensation would be the State's share." (App. E, pp. 11a-12a)

On May 28, 1980 the 23 U.S.C. § 129(a) agreement was executed between FHWA and the State of Washington. In accordance with FHWA's instructions, section 3 stated:

> 3. It is agreed that all property damage insurance proceeds received by the State as a result of the partial destruction of the original Hood Canal Bridge (together with interest thereon) shall be used for reconstruction of the bridge so as to reduce the amount eligible for Federal Emergency Relief Funds and shall be deemed construction costs paid by the State.

Pet.'s App. F, p. 65(a).

The insurance proceeds were paid to FHWA in April of 1983. The state then assumed responsibility for and paid $11.6 million to its contractor to complete construction. FHWA had suggested and agreed that the proceeds could be held by the state until 1985. The interest would then be used to pay the state's share of reconstruction of the surviving east half of the bridge. A new FHWA director reversed this position. FHWA and the state eventually agreed that a portion of the interest earned would constitute part of the state's cost of construction based upon a declining balance assuming the state had immediately expended the sums for reconstruction.

The date of repayment was also a result of a suit by the bondholders attempting to keep the proceeds held intact until the bridge was completed based upon the bond covenants. In December of 1982 the State Superior Court allowed the state to use the interest and insurance to reimburse FHWA for the emergency funds used on the bridge.

SUMMARY OF ARGUMENT

The petition does not present any special or important reasons for the court to grant a Writ of Certiorari. The decision below is a narrow one which is unlikely to occur and does not affect broad, important or substantive programs, positions or laws.

The Ninth Circuit's decision was correct in compliance with the plain meaning of the statutes involved. The result reached by the court which upheld the actions of FHWA is a fair result considering all the facets of the situation which presented itself to FHWA for enactment of an agreement.

ARGUMENT

A. The Petition Does Not Present Any Special Or Important Reasons For The Court To Grant A Writ Of Certiorari.

Petitioners rely on Rule 17.1(c) set forth in App. F, pp. 13a-14a. The provision states:

> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but which should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court.

Petitioners have stated that the issue has not been decided by this court or any other jurisdiction. Although this is true, there is no demonstrated reason why it should be so resolved. There is no conflict with any applicable decisions of this court or of any other court.

The Ninth Circuit's decision that FHWA's interpretation that the insurance proceeds and interest thereon were not federal contributions but state costs of construction was not arbitrary or capricious or an abuse of discretion and was in accordance with the plain meaning of Section 129(a).

The Ninth Circuit's decision was a review of a federal agency's action. FHWA's decision in enacting the 129(a) Agreement was based upon not only the statutory language but the origin of the State's proceeds, its availability, the history of the construction of the original bridge and the situation the State found itself in. FHWA's action is not the kind of agency action that has an important impact on other federal programs, policies or other laws.

As pointed out by the Petitioners, there is only one other 129(a) Agreement in existence that dealt with insurance proceeds. That agreement involved an entirely different set of circumstances involving State contributions and provides no necessity for the highest judicial review of FHWA's action in this situation. FHWA's actions were consistent with each action. This case is fairly unique and not apt to be duplicated.

The court's decision is not inconsistent with applicable rules of statutory construction. The Ninth Circuit found that FHWA's interpretation of 23 U.S.C. § 129(a) was in accord

with its plain meaning. This was a straightforward interpretation of a statute. The decision does not affect any established statutory rules of construction. It merely found those advanced by Petitioner were not applicable.

B. The Ninth Circuit's Decision Is Correct.

Petitioners' argument relating to what constitutes "costs of construction" is an attempt to draft onto 23 U.S.C. § 129(a) a concept not included in its plain language. Petitioner seeks to restrict the source of funds that might be contributed by the State. Petitioner would permit recovery in tolls from only monies obtained in certain situations. Nothing in the language of 23 U.S.C. § 129(a) or 23 U.S.C. § 301 attempts to limit the State's source of funding. As pointed out by the Ninth Circuit, this concept could in fact impede or prevent a State in participating in the federal program. This would be especially true where FHWA found no special circumstances to exceed the 75% amount stated in 23 CFR § 668.107(b) cited by Petitioners.

The Ninth Circuit rightfully rejected Petitioner's argument that the State's insurance and interest proceeds somehow were converted into federal funds never belonging to the State. In short, the Pet.'s argument is an argument that insurance proceeds were "that part contributed by the United States", a position not in accordance with the facts of this case. The assertion that the federal government contributed 100% of the funding is not supported by the facts and was rejected out of hand by the Ninth Circuit.

The insurance proceeds clearly belonged to the State in accordance with the bond conditions which required the State to either reconstruct the bridge or retire the bonds. Neither State law nor Federal law transferred title to such funds to the United States. This was only accomplished through the provisions of the 129(a) Agreement as an agreed-upon reimbursement for advanced federal emergency relief funds. The timing and procedure as to when the reimbursement was to made was part of the Agreement and did not make the funds any less costs of construction, nor the funds paid directly to the contractor.

C. The Ninth Circuit's Decision Is Fair.

Nothing in 23 U.S.C. § 301 or § 129(a) places any restriction on what purposes recovered toll revenue may be used by the State. The Federal statutory scheme clearly authorizes the recovery of tolls in the amount of the State's contribution to the cost of the bridge. This is not a windfall to the State.

In this case, that is particularly true because such tolls are by statute and agreement set aside for the maintenance and operation of the facilities covered by the bond covenants as well as payment of interest and principal for the bonds which will not be retired until the year 2002.

Without utilization of the insurance proceeds the public would not have had a reconstructed bridge and the State clearly would have had to utilize the insurance proceeds to retire the existing bonds. Clearly the public and members of Pet.'s class understood and reasonably anticipated that the tolls would remain on the bridge for the 40-year term of the bonds until 2002. The financing of the reconstruction in part by the federal government does not change this concept.

D. The Ninth Circuit Was Entitled To Give Deference To FHWA's Interpretation of Applicable Statutes.

FHWA's interpretation deserve great deference especially in the light of the fact the Ninth Circuit's interpretation of 23 U.S.C. § 129(a) and 23 U.S.C. § 301 was similar.

The interpretation is consistent with both of the statutes. Nothing in 23 U.S.C. § 301 remotely suggests that 23 U.S.C. § 129(a) is to be given an artificial and limited interpretation. It clearly exempts from the toll-free concept those situations provided for in Section 129, specifically enumerating toll bridges. The introductory statements in 23 U.S.C. § 129(a) clearly indicates it is a separate concept and not governed by 23 U.S.C. § 301 with the statement that it applies "not withstanding the provisions of Section 301."

FHWA's interpretation relating to the treatment of the insurance proceeds has been consistent since the disaster, considering those funds as "costs of construction." Florida's agreement dealt with a myriad of funds contributed by that

State constituting "costs of construction." Florida never had requested that the insurance proceeds be treated as costs of construction nor apparently was that necessary. FHWA's position was that the State had to request that type of treatment. FHWA's treatment of insurance proceeds thus was not inconsistent between the two situations.

The United States originally appealed the District Court's decision. The State withdrew its appeal contesting the United State's position on that portion of the District Court's decision relating to the interest. In addition, a stipulation was entered withdrawing the government's appeal. The failure to participate in the appeal does not signify the agency has changed its position. The basis for its decision to leave the appeal to the State is not disclosed by the record and could have been based on many factors including priorities and costs. Nothing in the record suggests FHWA has changed its position on the treatment of the insurance proceeds. The Ninth Circuit Court's review is consistent with the concepts set forth in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L.Ed.2d 137 (1972). FHWA's decision and interpretation of the pertinent statutes was based upon the relevant factors and was free from any clear error of judgment.

CONCLUSION

The Court is respectfully requested to deny the Petitioners' petition for a Writ of Certiorari

DATED this 30th day of November, 1988

Respectfully submitted,

KENNETH O. EIKENBERRY
THEODORE O. TORVE*
Senior Asst. Attorney General
Attorneys for Petitioners and
Counsel of Record(*)

APPENDIX A

EXCERPT FROM THE WASHINGTON TOLL BRIDGE AUTHORITY BOND RESOLUTION SECTION 2

Payment for the retirement of the Bonds and any additional revenue bonds hereafter issued in parity therewith in accordance with the provisions of Section 30 hereof, by redemption or otherwise, and payment of interest thereon are secured by a first and prior charge against and lien upon all of the tolls and revenues of the Ferry System and all funds created by this Resolution, except the Revolving Fund, and all moneys at any time therein and on any interest which may be earned from the deposit or investment of any such tolls and other revenues and against the Puget Sound Reserve Account of the Motor Vehicle Fund created by Chapter 7, Laws

of 1961, Ex. Ses., of the State of Washington, and, to the extent that all revenues from the Ferry System and the Hood Canal Bridge available therefor are insufficient to provide for the payment of principal and interest on the Bonds and for sinking fund requirements established with respect thereto and the required payments into the Ferry Improvement Fund, against all revenues derived from the 1/4-cent of motor vehicle fuel tax and 1/4-cent of fuel tax required by law to be deposited in the Puget Sound Reserve Account, except for payment of costs of operation, maintenance and necessary repairs of the Ferry System, and all of said tolls and revenues and pledged Puget Sound Reserve Account moneys are hereby irrevocably pledged for the payment or redemption of the Bonds and interest thereon . . . .

APPENDIX B

EXCERPT FROM THE WASHINGTON TOLL BRIDGE AUTHORITY BOARD RESOLUTION

Section 15. So long as any of the Bonds remain outstanding, the Authority shall cause to be procured and at all times maintained with an insurance company or companies authorized to do business in the State of Washington adequate insurance, to the extent procurable, and subject to such deductibles as may be determined advisable by it, upon all ferries as follows:

. . . .

(2) Protection and Indemnity insurance against liability arising out of claims and liabilities which are

customarily covered by such insurance on vessels.

The Authority will also at all times cause to be maintained with an insurance company or companies authorized to do business in the State of Washington adequate insurance, to the extent procurable, upon any bridge or bridges, slips, piers, wharves, docks, buildings and other terminal structures constituting any part of the Ferry System against loss or damage to the extent customarily carried by operators of similar properties.

. . . .

All other moneys collected on any other insurance shall, at the option of the Authority (a) be used to pay any loss suffered by the Authority for which

such moneys were collected, (b) be applied to replacement, reconstruction, or restoration of the property damaged to at least the same good order, repair and condition as it was in prior to the damage, or (c) be used to retire outstanding Bonds.

APPENDIX C

EXCERPT OF LETTER FROM JOHN S. HASSELL, JR., DEPUTY ADMINISTRATOR, FHWA, TO HONORABLE DIXIE LEE RAY, GOVERNOR, STATE OF WASHINGTON, DATED MAY 21, 1979

Pursuant to Section 125 of Title 23, United States Code, I concur in your proclamation of February 15, 1979, declaring an emergency as a result of the failure of the Hood Canal Bridge on State Route 104 on February 13, 1979. A copy of your proclamation and additional information on the catastrophic failure of this bridge was sent to us by the Washington State Department of Transportation with the State's application for emergency funds and a request to increase the Federal share to 100 percent of eligible costs.

Subject to the provisions of Section 129 of Title 23, United States Code, regarding toll bridges and ferry operations, I find the cost of repair or reconstruction of the Hood Canal Bridge eligible for emergency funding under Section 125. I further find it to be in the public interest to increase the Federal share of such work to 100 percent of eligible cost.

The Washington State Department of Transportation is being notified of this approval through our Washington Division Administrator, Mr. Paul C. Gregson.

APPENDIX D

EXCERPTS FROM MEMORANDUM FROM MR. MORGAN, ASSOCIATE ADMINISTRATOR, FHWA, TO L. E. LYBECKER, FHWA REGIONAL ADMINISTRATOR, PORTLAND, OREGON DATED MAY 21, 1979

Federal fund eligibility of all permanent and temporary work related to reconstruction of the Hood Canal Bridge is subject to execution of an agreement pursuant to 23 U.S.C. 129 if any tolls are to be charged on the rebuilt structure or the temporary structure. The Federal Highway Administration approval of a Section 129 agreement is subject to there being State construction costs to be repaid. Such costs may include:

(a) construction costs of the old bridge which are in excess of the net amount of all tolls

received less maintenance, operation and debt service costs, and which are not in excess of the value of the remaining portion of the old bridge, and

(b) construction costs of the new bridge, including emergency repairs, paid by the State.

. . . .

Since the insurance compensation is not specifically for another purpose, it must be used to reduce the Federal share of the construction costs. The use of the insurance compensation to pay eligible construction costs would be a State cost of construction which could be recovered by collection of tolls

pursuant to 23 U.S.C. 129. Counsel should be involved in the disposition of the above toll and insurance issues.

(Emphasis added.)

APPENDIX E

EXCERPTS FROM MEMORANDUM FROM CHIEF COUNSEL, FHWA, TO MR. LORENZO CASANOVA, CHIEF COUNSEL, FHWA, DATED JUNE 20, 1979

It is our understanding that Regional Counsel, Robert Rutledge, will take the lead in preparing a 23 U.S.C. 129(a) agreement covering the Hood Canal Bridge. We have sent a sample agreement and will be available for consultation if needed.

Present proposals would allow the State to charge tolls on the temporary and permanent structures until the State's share of the cost of construction, less operation and maintenance, are recovered as follows:

(a) construction costs of the old bridge still outstanding but not to exceed the current value of the remaining portion of the old bridge. The figures developed should be verified by audit.

(b) construction costs of the temporary and new bridge, including emergency repairs paid by the State. The insurance compensation would be the State's share.

APPENDIX F

EXCERPTS FROM UNITED STATES SUPREME COURT RULE 17.1

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

. . . .

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

question in a way in conflict with applicable decisions of this Court.